



Kondowa v Abyssinia Iron & Steel Limited & another (Employment and Labour Relations Appeal E003 of 2025) [2025] KEELRC 2924 (KLR) (23 October 2025) (Judgment)

Neutral citation: [2025] KEELRC 2924 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
EMPLOYMENT AND LABOUR RELATIONS APPEAL E003 OF 2025
MA ONYANGO, J
OCTOBER 23, 2025**

BETWEEN

DICKSON KONDOWA APPELLANT

AND

ABYSSINIA IRON & STEEL LIMITED 1ST RESPONDENT

LABOUR PLANET LIMITED 2ND RESPONDENT

JUDGMENT

1. This is an appeal arising from the ruling of Hon. Cheronno M. Kesse (Senior Principal Magistrate) delivered on 23rd January, 2023 in Eldoret CMCC No. E069 of 2023, wherein the learned magistrate allowed an application dated 23rd May, 2024 and set aside an ex parte judgment in favour of the Appellant against the Respondents herein who were also Respondents in the suit before the trial court.
2. In the Memorandum of Appeal dated 7th February, 2025 the Appellant sets out the grounds of appeal as follows:
 - a. The honourable magistrate erred in law and fact when she failed to appreciate that service of demand letter, statement of claim and summons to enter appearance were properly done at the factory premises of the 1st Respondent where the 2nd Respondent are premised as well within Eldoret town.
 - b. That the learned magistrate failed to acknowledge that, the Applicants filed return of service sworn by counsel Samuel Oyugi Ondieki on 7th August, 2023 and filed in court on 7th August 2023
 - c. That the honourable magistrate erred in law and fact by failing to appreciate that, request for judgment dated 9th August, 2023 and filed in court on 10th August, 2023 was correctly allowed by the trial court having been satisfied that service was done properly but the Respondents



refused to enter appearance hence honourable Richard Odenyo (SPM) certified the matter as undefended cause.

- d. That the honourable magistrate erred in law and fact by failing to acknowledge that, the Respondents were again served with a mention notice dated 21st August 2023 and affidavit of service dated 22nd August 2023 and filed to that effect but even so the Respondents did not show up in court.
 - e. That the Respondents were still served on 15th September, 2023 with a notice of mention for 7th December, 2023 and we subsequently filed an affidavit of service dated 22nd September, 2023 but still they made no appearance in court hence the matter proceeded for formal proof hearing and judgment was delivered on 25th April, 2024 in favour of the Claimant by the trial magistrate.
 - f. That the honourable magistrate failed to take note that the trial magistrate honourable Richard Odenyo (SPM) was satisfied with all efforts made by the Applicants to inform the Respondents at every stage of this matter in court and for the Respondents to turn around and meddle lies before the court is very unfortunate and against proper principles of legal practice.
 - g. That the honourable magistrate failed to appreciate that not all companies have allowed receiving of documents by stamping and in fact security officers at the gate receive documents without even signing at all hence as much as one can insist for a stamp it is not possible with some companies.
 - h. That the human resource manager who is now the 1st Respondent witness has all along been acknowledging service on behalf of the 1st Respondent and it is very unclear how again they claim that, they were not served.
3. The appeal was disposed of by way of written submissions.

Appellants submissions

4. The Appellant filed submissions dated 13th June, 2025 in which he sets out the following issues for determination:
 - a. Whether the 1st Respondent was properly served with the Memorandum of Claim and other court documents,
 - b. Whether the trial court erred in setting aside the judgment on the basis that there was no company stamp acknowledging receipt,
 - c. Whether the Appellant is entitled to reinstatement of judgment entered after formal proof hearing.
5. On the first and second issues the Appellant submitted that the Respondents were properly served with demand letter dated 23rd June, 2023 and thereafter served with a Statement of Claim dated 19th July, 2023 which was received and signed by one Michael on behalf of the 1st Respondent on 20th July, 2023 at 4:02 pm. That an affidavit of service to that effect dated 7th August, 2023 filed in court.
6. It is submitted that a request for interlocutory judgment dated 9th August, 2023 and mention notice dated 25th August, 2023 were served upon the Respondents and an affidavit of service dated 22nd August, 2023 filed confirming service.



7. It is further submitted that on 15th September, 2023 the Applicant served the Respondents with a mention notice to fix hearing date for formal proof hearing, and the same was received by the 1st Respondent on 15th August, 2023 and an affidavit of service dated 22nd September, 2023 was filed.
8. It was submitted that under Order 5 rule 3 service of documents may be effected upon an officer or employee of the company at the registered office. That Mr. Michael being a Senior Human Resource Officer of the 1st Respondent did not raise any objection to the service. For emphasis the Appellant relied on the decision in Kenya Power and Lighting Company Limited v Benzene Holding Limited [2016] where the court held that actual service cannot be invalidated by absence of a stamp.
9. The Appellant further submitted that under Order 10 rule 11 of the Civil Procedure Rules a party may appeal against a ruling that sets aside a regular judgment, relying on the decision in Shadrack Arap Boiwo v Bodi Bach [1987] eKLR where the court of appeal held that “where a party is aware of a proceeding and chooses not to participate, they cannot later claim denial of justice.”
10. On the third issue the Appellant submits that setting aside a regular judgment is discretionary but such discretion must be exercised judiciously and not capriciously as was held in the case of James Kanyita Nderitu v Marios Philota Ghikas & another [2016] eKLR wherein the court stated: “where the judgment is regular, the court has undeterred discretion but this discretion is intended to avoid injustice or hardship resulting from accident, inadvertence or excusable mistakes.
11. It is submitted that in the instant case there was no excusable mistake as the Respondent consciously ignored the proceedings.

Respondents Submissions

12. For the 1st Respondent it is submitted that it was not served with summons and that the affidavits of service were falsified. It submitted that the 1st Respondent does not operate in the same premises with the 2nd Respondent as stated in the affidavit of service and that the signature of its Human Resource Manager who is alleged to have received all the documents served is not his.
13. The 1st Respondent submits that to enter its premises one has to be cleared by the security at the gate who direct the visitor to the relevant office after signing the register.
14. It is further submitted that documents served upon the 1st Respondent are received by the Company Secretary and the Human Resource Manager would only receive documents when the Company Secretary is absent. The 1st Respondent states that it is not possible that every time the Appellant served documents the Company Secretary was absent.
15. It is further submitted that all documents received by the 1st Respondent are stamped while what was presented to court was not stamped by the company.
16. It is further submitted that the 1st Respondent filed a draft defence which discloses triable issues.
17. The 1st Respondent concludes that the appeal ought to be dismissed relying on the decisions in Agigreen Consulting Corp Limited v National Irrigation Board [2020] wherein the decisions in James Kanjiita Nderitu v Philitas Ghikas & another was cited with approval; Gladys Jepkosgei Boss v Star Publications Limited [2021] eKLR and Thorn PLC v Macdonald [1999] CPL 690.



Analysis and Determination

18. I have considered the grounds of appeal and the rival submissions by both parties. The issues that arise for determination in the appeal are whether the trial court erred in setting aside the ex parte judgment and if the Appellant is entitled to the orders sought.
19. Setting aside of ex parte judgments is provided for in Order 10 Rule 11 of the Civil Procedure Rules, 2010 which empowers the Court to set aside or vary a default judgement entered under Order 10 (in default of Appearance or Defence) and any consequential decree or Order upon such terms as are just. It provides that: -
 11. Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.
20. In the instant case the trial court found that there was no proper service upon the Respondents based on the averments in the affidavit in support of the application for setting aside the judgment dated 23rd May, 2024. The trial court further found that the application was filed without delay, and that the Respondent has a reasonable defence that raises triable issues as per draft defence filed with the application.
21. As provided in Order 10 Rule 11 of the Civil Procedure Rules, setting aside of default judgments is a matter of discretion, which in the instant case the trial court exercised in favour of the 1st Respondent.
22. The appellant has invited this court to interfere with the exercise of discretion by the trial court. As a first appellate court, I should not interfere with the exercise of discretion by an inferior court unless I am satisfied that its decision is clearly wrong due to misdirection or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration with the result that it arrived at a wrong conclusion. [See *Mombasa Cement Limited v Kitsao & 34 others* [2022] KECA 562 (KLR)].
23. To do so the court must distinguish whether the judgment entered was regular or irregular. Fortunately for this court, the Court of Appeal has had the advantage of expressing itself on this discourse. In *James Kanyिता Nderitu & another v Marios Philotas Ghikas & another* the Court of Appeal held:

“From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among other. See *Mbogo & Another v Shah* (supra), *Patel v E.A. Cargo Handling Services Ltd* (1975) EA 75, *Chemwolo & Another v Kubende* [1986] KLR 492 and *CMC Holdings v Nzioki* [2004] 1 KLR 173).



In an irregular default judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside *ex debito justitiae*, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issue or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system.”

24. In the instant case the trial court found that the judgment was irregular as the Respondents had not been properly served.
25. The Appellant has not given me any compelling reason to disagree or interfere with the discretion of the trial court which in my view was exercised judiciously and is supported by the evidence on record.
26. For these reasons I find no merit in the appeal and dismiss the same.
27. Each party shall bear their own costs of this appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 23RD DAY OF OCTOBER 2025

MAUREEN ONYANGO

JUDGE

